

REMARKS/ARGUMENTS

Presently, the Examiner has rejected all pending claims of the application. More specifically, the Examiner rejects claims 30 and 31 under 35 U.S.C. § 112, and claims 1, 3-9, 14, 15, 32, 38 and 81 under 35 U.S.C. § 102(e) as anticipated by U.S. Patent Application Publication No. 2004/0109933 to Roy et al. In addition, claims 10-13, 19, 20, 22, 24, 27, 29-31 and 36 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Roy et al. in view of U.S. Patent No. 6,309,686 to Zietlow (Zietlow '686); claims 16-18, 21, 23, 25, 26 and 33 stand rejected as unpatentable over Roy et al. in view of U.S Patent No. 6,207,216 to Zietlow (Zietlow '216); claims 34 and 35 stand rejected as unpatentable over Roy et al. in view of Zietlow '216; and claims 37 and 39 stand rejected as unpatentable over Roy et al. in view of Zietlow '216, Dictionary of Food Ingredients, 4th Edition (Igoe) and U.S. Patent No. 4,251,561 to Gajewski. Additionally, the Examiner has found the § 1.131 Affidavits filed on February 27, 2008 unpersuasive.

§ 112 Rejections

With respect to the § 1.12 rejection of claims 30 and 31, the Applicant has essentially amended all the dependent claims to avoid any potential confusion, and particularly claims 20, 29, 30 and 31 such that subject matter of the claims is distinctly claimed, based on the Examiner's comments. More specifically, the dependent claims have been amended to provide a matching introduction of the claimed food product, claim 20 now requires that "the dried soft aerated confection food product is in the form of a phase or portion of a composite food product", claim 29 requires that "the phase or portion is in the form of a core", claim 30 refers to "The dried soft aerated confection food product of claim 29" and claim 31 refers to "The dried soft aerated confection food product of claim 30." Based on these changes, withdrawal of these formal rejections is requested.

§ 102 & § 103 Rejections

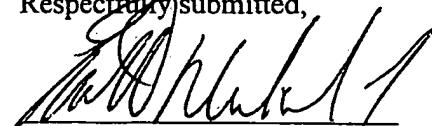
The Applicant maintains that Roy et al. is not an anticipating reference and the combination of Roy et al. in view of Zietlow, etc. does not render obvious the claimed subject matter, for at least the reasons discussed in the February 27, 2008 Amendment, as well as prior responses and the further comments set forth below. Simply stated, the prior art just does not teach or suggest a soft dried marshmallow having the glass transition temperature (Tg) or springback factor as claimed. Certainly the Applicant is at a loss in responding to the Examiner's position, which is basically an acknowledgement that the patents do not disclose the claimed springback factor or glass transition temperature but, since the Patent Office cannot perform experiments to verify the distinctions, the rejections will be maintained. The Applicant has fully explained why the prior art patents do not meet these limitations and has particularly pointed out that the "crisp, frangible" pieces relied upon by the Examiner cannot be properly considered to have these features. In addition, the Applicant has referred to explicit case law regarding the requirements to explicitly show all features in an anticipatory rejection and that any position of "may be inherent" is a completely improper rejection basis. Aside from supplying the Examiner a laboratory to conduct the "necessary" experiments and manufacturing referred to by the Examiner in the Office Action, it appears that nothing else will be convincing to the Examiner. On this point, the Examiner references *In re Spada* which dealt with a case where the prior art had "**identical monomers, employing the same or similar polymerization techniques**" to establish the same attributes as the claimed invention. That is quite different from the present situation where the attributes of a soft, dried confection product which will springback a minimum of 20% and up to 50% clearly cannot be met by a crisp, frangible product. Why is it not clear to the Examiner that a crisp, frangible food product would not even be a soft food product, let alone have anything near the required springback factor? It would seem that common sense would dictate a different conclusion. In any case, the Applicant maintains that none of the applied references, either taken single or in combination, teach or suggest a soft dried marshmallow having the physical characteristics of the present invention, and again requests reconsideration on these points.

§ 1.131 Affidavits

The § 1.131 Affidavits were submitted in order to establish a reduction to practice of the present invention prior to the Roy et al. prior art date of October 31, 2003, to remove Roy et al. as prior art. Unfortunately, the Examiner has basically rejected the Affidavits as unsupported arguments. First of all, it should be recognized that a distinction exists between arguments which may be provided in a response, such as this, and those made in a signed declaration under acknowledgement of penalties for false statements. Second, it became apparent to the undersigned that the Examiner did not receive the supporting documents mentioned in at least one of the previously filed affidavits. In fact, the PAIR system does not show these documents as well. In any case, provided herewith are copies of the supporting documents which clearly show the 2002 conception and reduction to practice which should result in the withdrawal of the Roy et al. reference as prior art.

Based on the above remarks, amendment to the claims and the enclosed evidence supporting the § 1.131 Affidavits submitted February 27, 2008, the Applicant respectfully submits that the present invention is patentably defined over the prior art of record such that entry of this amendment/response, withdrawal of the Roy et al. reference as effective prior art, and passage of the application to issue are respectfully requested.

Respectfully submitted,



Everett G. Diederiks, Jr.
Attorney for Applicant
Reg. No. 33,323

Date: October 23, 2008
DIEDERIKS & WHITELAW, PLC
12471 Dillingham Square, #301
Woodbridge, VA 22192
Tel: (703) 583-8300
Fax: (703) 583-8301